No. 2868

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. M. SHOOK, Trustee of the Estate of Farmers Dairy Association, a corporation, Bankrupt,

Appellant,

vs.

A. LEVI,

Appellee.

Brief of Appellee

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Brief of Appellee

The statement of the case as presented by counsel for appellant in his brief, in some particulars is not in accordance with the Referee's Certificate on Review.

On page 4 of appellant's brief, counsel states: "That according to the evidence of petitioner, and Mr. Peavey, said notes represented the purchase price of said horses, and were received and accepted by said Levi in payment for said horses." Mr. Peavey testified in substance (p. 20, R.) that he, during the times mentioned in said petition, was the President of said Farmers Dairy Association, the bankrupt, and at certain times during said period was Manager of said corporation. Witness and petitioner (appellee) negotiated for the sale of two of said horses. Mr. Peavey, at that time stated, and witness understood, that title to said horses

was to remain in the seller until the purchase price therefor had been paid; that this contract and understanding was verbal; that promissory notes of the corporation representing the purchase price of said two horses were given by the corporation and it was understood between the witness and petitioner that the same should be done. That other and similar transactions were had between the witness and petitioner, which according to Mr. Peavey's testimony covered all the horses in dispute.

Mr. Levi, the appellee herein, according to the Referee's certificate on review, stated (p. 23, R.) that on each and all occasions in his dealings with Mr. Peavey relative to the sale of the horses, he stated that the title to the horses in question should remain in him until the purchase price was paid. Mr. Levi, on cross-examination stated (p. 24, R.) that: "the contract for sale of said horses was made with Mr. Peavey on behalf of the Farmers Dairy Association, and was verbal. That the Corporation took the horses and kept them in their charge; that he knew the corporation was carrying the horses on their books as an asset of the corporation; that promissory notes were given him by the corporation for the purchase price of said horses, and he accepted said notes; that title to said horses was not reserved in the notes, but that the notes were ordinary notes, due several months after date."

On page 4, counsel in his brief states:

> "That each and all of the notes so given in payment for said horses were in the possession of, and the property of, A. Levi, petitioner, at the time of the adjudication in bankruptcy of said Corporation."

I do not find that the record supports this statement.

Again on page 5, counsel in his brief states, that credit was extended to the corporation on the strength of its financial statements * * * * * that the petitioner, A. Levi, had received such statements. The record, we submit, does not support this statement. There is no evidence that the statements in question were gotten out by the corporation for the benefit and information of its creditors; there is no evidence that any credit was ever extended to the corporation on the strength of such financial statements. There is no evidence that the appellee, Mr. Levi, ever received any such statements from the corporation or had any knowledge of any financial statements of said company.

Again, on page 5, counsel for appellant in his brief states: "that petitioner, at no time prior to the bankrupt's adjudication, according to the evidence, asserted in any way, his right or title to said horses." We call attention to the Record, page 21, and quote therefrom testimony of Mr. Peavey: "That during the first part of July, 1915, witness entered into a certain contract with Mr. Schnell for the sale of the horses in question; that at this time, Mr. Levi, the petitioner, told Mr. Schnell of said contract of sale *by which* between witness and petitioned." Witness further testified (p. 21, R.): "That witness, petitioner and Mr. Serrano on one occasion went to the livery-stable of a Mr. Williams, in San Diego for the purpose of getting information concerning one of the horses in question, which had been traded by Mr. Powers, the then manager of said corporation; that petitioner at

that time told Mr. Williams that the horse in question belonged to him by virtue of the conditions of said sale."

Other and similar testimony was given by Mr. L. A. Serrano (p. 22, R.) a member of the Board of Directors of said corporation, Mr. George M. Kimball (p. 23, R.) also a member of the Board of Directors and Mr. Edgar Levi (p. 24, R.) a son of the petitioner.

It seems that the only officer of the company, as revealed by the record, which did not have knowledge of the circumstances surrounding the sale of the horses and the conditions thereof, was Mr. H. Stephenson, who was Secretary of the Association at the time of the purchase of the last-named five horses from Mr. Levi, and he testified (p. 25, R.) that when Mr. Peavey came to his office and requested him to sign the notes of Mr. Levi, that "Mr. Peavey did not state any condition attached to the sale of said horses, and witness considered that the notes were given in payment of the purchase price. That witness did not know, nor did Mr. Peavey tell him that the title to said horses was reserved in seller," and witness further stated that the Board of Directors of said corporation of which he was a member, took action on said matter.

No findings were made by the Referee and the only action taken by the Referee on the petition in reclamation of Mr. Levi, is found in the Record (p. 18, folio 21) which is as follows: "It is hereby ordered that the petition in reclamation of the said Adolph Levi, as to the property claimed to have been sold on conditional sale, be, and the same is hereby, dismissed and denied." Just

why the Referee dismissed and denied the petition in reclamation does not appear.

It is true, as stated by counsel in his brief at page five, that the District Judge rendered an opinion reversing the order and decision of the Referee, which opinion was not entirely in harmony with the argument and reasoning of counsel, either for the appellant or appellee, but I do not agree with counsel in his statement that such opinion was on "a theory foreign to and entirely without the scope of the evidence."

ARGUMENT.

We believe it is conceded that there is no Statute in California requiring the recording of a contract of sale reserving title, neither is there any Statute which would render an oral agreement of such character ineffectual.

The Supreme Court of California has recognized as valid an oral agreement reserving title in the seller to personal property until the purchase price was paid.

Wise vs. *Collins*, 121 Cal., 147.

In the absence of Statute requiring contract of conditional sale to be in writing or requiring the filing or recording thereof, an oral contract would be valid.

Weier & Frank Company vs. *Sabin*, 214 Fed., 231;

Blackwell vs. *Walker*, 5 Fed., 419.

Under the laws of California such a contract as appellee relies on, reserving the title, is valid as against creditors and consequently would be good as against the Trustee in Bankruptcy.

Perkins vs. *Mettler*, 126 Cal., 100;

Van Allen vs. *Francis*, 123 Cal., 474.

The giving of a note for the purchase price will not, in the absence of agreement to that effect, vest title in the seller.

35 Cyc. 672, Note 47.

Heryford vs. *Davis*, 102 U. S., 235.

It might be held under the record in this case, that no effectual contract was entered into between the petitioner, appellee herein, and said appellant, on the theory that the corporation, through its Board of Directors, did not authorize the making of such a contract as the petitioner relies on.

Fontana vs. *Pacific Can Co.*, 129 Cal., 51.

However, in this particular, we call the Court's attention to the testimony of Mr. Peavey (p. 22 top): "That the matter of said purchases was brought to the attention of the Board of Directors of said corporation and they took action on same." Witness had already in his testimony, explained the conditions of said purchase, he then states that "said purchase" was brought to the attention of said Board of Directors and they took action on it. Would it not be fair to presume, under such testimony, that witness brought to the attention of the Board of Directors the conditions of the purchase and the reservation of the title in the seller? Again, Mr. Serrano testified: (p. 23) "That the matter was brought to the attention of the Board of Directors of the corporation and they took action on it." Mr. Serrano's testimony shows that he, a member of the Board of Directors, had knowledge of the fact that title to said property was reserved in the seller and when he testified that: "the matter was brought to the attention of the Board of Direct-

ors" would it be a fair inference that he sat by and allowed the Board of Directors to be misled as to the conditions of the purchase? In fact, Mr. Serrano appears to have made the motion on both occasions when the Board of Directors took action concerning the purchase in question. (R. p. 26.)

Under the Record, however, a matter arises which will estop the appellant from repudiating the contract on which the appellee relies.

> "One of the most frequent applications of the principle of equitable estoppel against corporations is that which arises where the corporation, when rights are asserted against it by virtue of its own contract, sets up a want of power in its officers to make the contract. One of the most frequent illustrations of this principle is presented where a corporation allows an officer, habitually and in the face of the public, to perform for it and in its name certain acts, in which case it will be estopped, as against a member of the public who innocently parts with value on the faith of the officer having the rightful power to do such an act, from denying that such is the fact."

10 Cyc. 1066, Paragraph 5;

Zabriskie vs. *Cleveland etc. R. Co.*, 23 How. (U. S.) 381, 16 L. ed., 488.

> "The same principle prevents a corporation from repudiating the acts of its officer within the general scope of its powers, in the absence of fraud on the part of the person seeking to charge the corporation or of collusion between him or his privies, and the officers of the corporation making the contract."

10 Cyc. 1067, and cases cited.

Seeley vs. *San Jose Independent Mill, etc., Co.*, 59 Cal., 22.

Corporation estopped from disputing the agency of a person assuming to order goods for it.

Electric Supply Co. vs. *Jersey City Electric Light Co.*, 42 Hun. (N. Y.) 659, 4 N. Y. St., 516.

It can not be disputed under the record of this case that the defunct association apparently clothed Mr. Peavey with authority to enter into the contract in question. It accepted the benefits of his contract retaining the horses and using the same. Supposing that Mr. Levi had brought suit against the association before it went into bankruptcy, for the purpose of recovering his property, would the association be permitted to claim title to the property on the theory that one of its officers whom it had authorized to purchase the property, did not explain to it in detail, the conditions of the contract of purchase and therefore and because of the officer's neglect the association would acquire an absolute title to the property in question and the seller would be powerless to recover his property, not because of any fault of his, but the neglect of the agent of the corporation who had apparent authority to act for it and was acting within the scope of such authority?

It does not appear how many members constituted the Board of Directors, but it does appear from the Record that Mr. Peavey, Mr. Serrano and Mr. Kimball, all members of the Board of Directors, had knowledge of the conditions of the contract and that title was reserved in the seller. Mr. Peavey, if he was President of the association during the period in question, must also have been a member of the Board of Directors (Sec. 308 C. C. Cal.) which provides: "Immediately after their selection the

directors must organize by the election of a President, who must be one of their number, etc."

No other contracts were had except those entered into by Mr. Peavey as disclosed by the record. Can the association stand on the contract so made by its agent, Mr. Peavey, providing it was an absolute sale, and on the other hand repudiate it if title was reserved? Will the association be permitted to profit by its own mismanagement? Mr. Levi had no knowledge at any time that the association claimed the title to the property in question. If any such claim was ever made, he at all times has occupied the position of an innocent party. The fact that he had knowledge that the association carried the property on its books as an asset, we submit in the absence of other conditions, would not prejudice his claim. If they listed the horses as an asset, it must be presumed that they also listed the liability to Mr. Levi under its agreement. Whether or not the association defrauded any of its creditors on the theory that it owned the horses in question free and clear or whether or not it failed to disclose the nature of the conditional purchase, does not appear and neither does it appear that Mr. Levi had any knowledge or was ever a party to any misrepresentation or fraud against the association or any of its creditors.

The mere fact that the contract in question was oral and consequently not recorded, we submit would not authorize the imputation of the same being a secret contract and a fraud on the creditors.

In re C. K. Hutchins Co., 179 Fed., 864.

If Mr. Levi started with ownership of horses, which it is admitted that he did and if he has not divested him-

self of such ownership by some positive act or if he is not estopped because of his acts or conduct from still asserting such ownership, then his claim should prevail.

Roth vs. *Smith*, 215 Fed., 82.

We submit under all the facts and circumstances as disclosed by the Record, and which are undisputed, it would be an injustice to deprive the claimant of his property.

We submit the decision of the District Judge was most equitable to the appellant, and we call attention to that part of the decision: "That the bankrupt corporation is entitled to a return of so much of the purchase price as has been paid thereon, less such a sum not to exceed in any event the amount of the purchase price thus far paid." Only a small amount in comparison with the purchase price of the property in question was paid, as disclosed by the record on page 26. The appellant still continuing to retain the property, would it be equitable to hold that the appellee shall not be entitled to more for the use of the property, than the amounts paid toward the purchase price?

The Court may make an order in this respect which shall be equitable and just.

In re Hooven Owens Rentschler Co., 195 Fed., 424.

It is also true that the appellee is entitled to recover the reasonable value for the use of the property.

In re Daterson Publishing Co., 188 Fed., 64.

The authorities cited by appellant in his brief do not in our judgment apply to such a case as the one at bar.

We contend that the judgment of the District Court should be affirmed, with such modifications as may be

equitable owing to the continuing possession of the property by the appellant. It may be that this Court will adopt a different line of reasoning from that adopted by the District Court, but in any event, we submit that the claim of the appellee should be recognized and his property ordered returned to him with such additional orders as justice may require.

Dated at San Diego, California, February first, 1917.

JAMES E. O'KEEFE,
Attorney for Appellee.